No. 88-81 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1988

VICTORIA M. VOGE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Claims Court lacked jurisdiction to review petitioner's military service records where there was no monetary claim at issue whose resolution depended upon a review of those records.

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OPINIONS BELOW

The opinion of the Claims Court (Pet. App. 21a-33a) is reported at 11 Cl.Ct. 510. The opinion of the court of appeals (Pet. App. 5a-15a) is reported at 844 F.2d 776.

JURISDICTION

The judgment of the court of appeals (Pet. App. 16a) was entered on April 19, 1988. A petition for rehearing was denied on May 26, 1988 (Pet. App. 3a-4a). The petition for a writ of certiorari was filed on July 14, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is now serving on active duty as a commander in the Medical Corps, United States Navy. In

1981, petitioner was assigned to the Naval Regional Medical Center on Guam. Upon arrival, she was granted temporary clinical privileges as a flight surgeon. Those temporary privileges were subsequently revoked, however, and her application for permanent clinical privileges was denied after doubts arose concerning her medical competence. The revocation and denial of petitioner's clinical privileges, as well as the underlying concerns as to her competence, were reflected in three adverse fitness reports covering periods between October 31, 1981, and March 31, 1983. Pet. App. 6a.

In 1982, petitioner sought additional special pay (ASP), an extra renumeration that a medical officer normally receives after executing an agreement to remain on active duty for at least one year. See 37 U.S.C. 302(c)(1). Based on the denial of clinical privileges and the adverse fitness reports, petitioner's commanding officer recommended that her request be denied for the period from July 1, 1982, until June 30, 1983. A review board approved that recommendation and further determined that petitioner should be denied ASP from July 1, 1983, until June 30, 1985, after she completed a course of retraining. In addition, petitioner was passed over for promotion to Captain in 1986. Pet. App. 6a.

Petitioner sought relief from the Board for the Correction of Naval Records (BCNR) pursuant to 10 U.S.C. 1552.[1] The Board recommended correction of portions of

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[1] Petitioner requested that her Naval records be corrected (1) to delete references to actions taken to revoke and deny her clinical credentials; (2) to reflect favorable action upon her request for permanent clinical credentials; (3) to delete all references to two psychiatric evaluations; (4) to remove adverse fitness reports; (5) to show that she was entitled to ASP; and (6) to order her considered by a special promotion board for promotion to Captain. Pet. App. 24a.

two adverse fitness reports but "concluded that the [reports] were otherwise not 'substantially erroneous or unfair' and that [petitioner's] selection for promotion would have been 'unlikely' even with the corrections to her records." Pet. App. 6a. Based on this recommendation, the Secretary of the Navy approved the deletion of specific references to pending administrative action in one of her fitness reports and removal of another report, but denied petitioner's other requests for relief (*ibid.*).

2. Petitioner then instituted this action in the Claims Court, seeking essentially the same relief that she had sought from the BCNR. Based upon procedural errors in the denial of petitioner's ASP,[2] the United States did not oppose the Claims Court's issuance of a judgment for three years' worth of retroactive ASP in the amount of $30,000 (Pet. App. 25a). The United States moved for dismissal of petitioner's remaining claims on the grounds that they were beyond the jurisdiction of the Claims Court.

The Claims Court granted judgment for petitioner in the amount of $30,000. The court further held that it had jurisdiction to review petitioner's service records pursuant

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[2] Specifically, the review board passing on petitioner's request for ASP considered information beyond that prescribed in Navy regulations, which confine review of the officer's performance to fitness reports issued as of the date of the agreement entitling the officer to ASP; supporting documents; a letter from the officer's commanding officer; and the officer's rebuttal, if any. In this instance, the review board apparently had a copy of petitioner's entire file, which included a fitness report subsequent to the date on which she became eligible for ASP. Pet. App. 26a. Furthermore, for the period from July 1, 1983, through June 30, 1985, petitioner's commanding officer never made an official recommendation that she should be denied ASP. That separate recommendation is required by Navy regulations, notwithstanding the review board's determination to deny petitioner ASP for that period. Pet. App. 7a.

to its review of the denial of ASP. After reviewing the administrative record, the court found no error in the "preparation or composition" of the fitness reports that the BCNR had refused to void and declined to "second guess" the judgments of petitioner's superiors, reflected in the fitness reports and the denial of clinical privileges, as to her medical and military competence. The court further held that petitioner had no right to reconsideration of her nonselection for promotion to Captain. The court accordingly denied any further relief. Pet. App. 26a-33a.

3. The court of appeals affirmed the Claims Court's judgment for ASP, but vacated that part of the Claims Court's decision that purported to review petitioner's military records. The court concluded that the substantive merits of the military's decision to deny petitioner ASP were not justiciable since "Congress statutorily entrusted [that decision] to the discretion of the military" and the courts may not second guess "routine personnel decisions regularly made by the military." Pet. App. 9a-11a. The court of appeals therefore concluded that the Claims Court had no jurisdiction, in the context of reviewing the procedures employed to deny ASP, to review the denial of clinical privileges and the adverse fitness reports upon which the military based its decision to deny petitioner ASP (*id.* at 8a-12a).

The court further held that the various record corrections sought by petitioner were not "an incident of [or] collateral to" (28 U.S.C. 1491(a)(2)) her monetary entitlement to ASP and hence were beyond the jurisdiction of the Claims Court. "The regularity of her military records and the actions of her superiors in evaluating her performance as a doctor and officer," the court concluded (Pet. App. 13a), are "entirely unrelated" to the question whether "in the ASP termination decision the military followed its own

regulations." Since petitioner sought no monetary relief based on the alleged errors in her military record, the court of appeals concluded that the Claims Court had no jurisdiction to conduct a general review of those records. In any event, the court stated (*id.* at 14a), the Claims Court cannot "do indirectly what it is foreclosed from doing directly. By considering her service records for error in their 'preparation or content,' " the court of appeals held (*ibid.*), "the Claims Court was passing on the merits of the decision to deny ASP which was first and last for the Navy."

ARGUMENT

The decision of the court of appeals is correct. It does not conflict with any decision of this Court or any other court of appeals. Accordingly, no further review is warranted.

The court of appeals correctly held that, in the course of reviewing the denial of ASP, the Claims Court could not review the discretionary assessments of petitioner's military and professional performance as reflected in her fitness reports and in the decision to deny her clinical privileges. Subsection 302(c)(2) of Title 37 provides that "[u]nder regulations prescribed by the Secretary of Defense * * *, the Secretary of the military department concerned may terminate at any time an officer's entitlement to [ASP]." Secretary of the Navy Instruction 7220.75A (Apr. 23, 1982) provides that the Surgeon General of the Navy may terminate ASP by approving the recommendation of a review board that the officer's "professional performance is inadequate to justify continuing payment of special pay" (Pet. 3). Neither the statute nor the implementing regulation provides a substantive standard governing the denial of ASP; the decision is left solely

to the discretion of the Navy. There is, therefore, " 'no meaningful standard against which [a reviewing court could] judge the agency's exercise of discretion.' " *Webster* v. *Doe*, No. 86-1294 (June 15, 1988), slip op. 6 (quoting *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985)).

The Navy consented to the entry of judgment for petitioner for ASP for the period from July 15, 1982, through June 30, 1985. Petitioner's entitlement to ASP for that period, however, rested exclusively upon the failure of officials to follow proper administrative procedures to terminate that entitlement. See *German* v. *United States*, 633 F.2d 1369 (Ct. Cl. 1980) (medical officer entitled to Variable Incentive Pay where determination to deny that pay was based upon consideration of improper matters). Although the Claims Court could properly review the decision to deny petitioner ASP for procedural irregularities, the Court lacked jurisdiction to review the substantive merits of that determination. The Claims Court, therefore, lacked any justification for reviewing petitioner's underlying military and professional records incident to its review of petitioner's claim for ASP.[3]

Courts have traditionally and properly been reluctant to intervene in any matter that "goes directly to the 'management' of the military [and] calls into question basic choices about the discipline, supervision, and control of a serviceman." *United States* v. *Shearer*, 473 U.S. 52, 58 (1985). The "complex, subtle, and professional decisions as to the composition, training, equipping, and control of a mili-

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[3] Petitioner does not claim that the denial of ASP—or the decision to deny clinical privileges—violated any substantive constitutional rights. Thus, the Court's recent decision in *Webster* v. *Doe, supra* (recognizing APA review for colorable constitutional claims even where decision is otherwise "committed to agency discretion by law" within the meaning of 5 U.S.C. 701(a)(2)), has no bearing on this case.

tary force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches." *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973) (emphasis omitted). On such matters, it is not appropriate for a "civilian court to second-guess military decisions." *United States* v. *Shearer*, 473 U.S. at 58. Indeed, "it is difficult to conceive of an area of governmental activity in which the courts have less competence." *Gilligan* v. *Morgan*, 413 U.S. at 10.

In view of these principles, it would be plainly inappropriate for a court to use a discretionary judgment to deny ASP as a window through which to conduct a general review of a military officer's service record. In the military context, this Court has always looked for an express mandate before exercising its jurisdiction in a way that might interfere with the smooth functioning of the military. See, *e.g.*, *Feres* v. *United States*, 340 U.S. 135 (1950) (declining to apply Federal Tort Claims Act to suits by servicemen for service-related injuries); *Orloff* v. *Willoughby*, 345 U.S. 83 (1953) (declining to review propriety of duty assignment); *Burns* v. *Wilson*, 346 U.S. 137, 142, 144 (1953) (plurality opinion) (giving narrow interpretation to scope of federal habeas corpus relief available to servicemen); *Gilligan* v. *Morgan*, 413 U.S. at 10 (declining to assume jurisdiction over training, weaponry and orders of National Guard); *Schlesinger* v. *Councilman*, 420 U.S. 738, 757-758 (1975) (limiting ability of servicemen to obtain injunctive relief for alleged wrongs, including constitutional violations); *Chappell* v. *Wallace*, 462 U.S. 296 (1983) (refusing to permit military personnel to maintain suit to recover damages from a superior officer for alleged constitutional violations); *Department of the Navy* v. *Egan*, No. 86-1552 (Feb. 23, 1988) (declining to permit Merit Systems Protection Board, in the course of reviewing an adverse action suffered by a civilian employee of

the Navy, to review security clearance determinations made by the Navy). The court of appeals thus correctly concluded that, in the course of reviewing the denial of ASP for procedural propriety, the Claims Court was without jurisdiction to review the discretionary assessments of petitioner's military and professional performance as reflected in her fitness reports and in the decision to deny her clinical privileges.

In any event, even if the Claims Court would ordinarily have jurisdiction to review the substantive merits of a decision to deny ASP, there was no occasion for the Claims Court to reach that question in this case because of its resolution of the procedural issue. Following the Navy's confession of procedural error, petitioner received complete relief for her loss of ASP. There was, therefore, no occasion for the Claims Court even to reach the question of whether the denial of ASP was arbitrary and capricious and, hence, no occasion for the Claims Court to examine the denial of clinical privileges and the adverse fitness reports that led to the denial of ASP. Petitioner cannot be heard to complain that, although she received complete relief in the form of restoration of lost ASP, the courts below granted that relief without reaching the grounds she advanced.

Petitioner correctly notes (Pet. 19-20) that in *Chappell* v. *Wallace*, 462 U.S. at 303, this Court stated that BCNR decisions are generally subject to judicial review and can be set aside if they are arbitrary or capricious. Petitioner, however, did not bring suit in district court seeking review of the decision of the BNCR declining to make requested changes in her military records. Rather, petitioner sought a money judgment in the Claims Court for the loss of ASP, and the court of appeals properly concluded (Pet. App. 12a-14a) that a general review of her service records

was not "incident of and collateral to" that issue within the meaning of 28 U.S.C. 1491(a)(2).

In *United States* v. *Testan*, 424 U.S. 392, 404 (1976), this Court held that 28 U.S.C. 1491(a)(2) (permitting the Court of Claims to grant relief "incident of and collateral to" a money judgment) did not expand the jurisdiction of the Tucker Act to encompass claims not based upon some statute or regulation that mandates compensation. Petitioner's entitlement to ASP under 37 U.S.C. 302(c)(2) depended solely upon the procedural irregularities in the discretionary determination made to deny her ASP. The corrections she sought to her underlying military records were wholly unrelated to that question. Thus, the Claims Court lacked jurisdiction to entertain petitioner's requests for changes in her military record, notwithstanding the jurisdiction of the BCNR to entertain those requests. The court of appeals properly rejected (Pet. App. 14a) petitioner's contention that the Tucker Act jurisdiction of the Claims Court is coextensive with the BCNR's broad equitable jurisdiction to correct military records pursuant to 10 U.S.C. 1552.[4]

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[4] In any event, although BCNR decisions are generally reviewable, the mere fact that an otherwise nonjusticiable claim has first been passed on by the BCNR should not transform it into a justiciable claim. The restrictions on the justiciability of claims raised by servicemen noted above (pp. 7-8, *supra*) should apply whether the case is brought directly to federal court or indirectly on review of a BCNR decision. Thus, petitioner' attempt to challenge simply the correctness—as opposed to the constitutional validity (see n.3, *supra*)—of the denial of clinical privileges would fail, in our view, even in a suit brought in district court on review of the BCNR decision as an impermissible judicial challenge to the propriety of a duty assignment. See *Orloff* v. *Willoughby*, *supra*. Of course, that question is not presented here.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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